IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 173 of 1997.

Judgement reserved on: 23.10.2007.

Date of decision: 24.10.2007.

Tanku ….. Appellant.

Vs.

Gawainu & ors. …. Respondents.

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1]

For the Appellant : Mr. Ashwani K. Sharma, Advocate.

For the Respondents : Mr. Lalit Sharma, Advocate.

Kuldip Singh, Judge.

This appeal is directed against the judgement and decree, dated 12.6.1997, passed by the learned District Judge, Mandi, Kullu and Lahaul Spiti Districts at Mandi, in Civil Appeal No. 46/92.

2. The facts in brief are that appellant Tanku filed a suit for permanent prohibitory injunction and possession against the respondents. In fact, the suit pertains to two parcels of land. The appellant prayed permanent prohibitory injunction decree against the respondents with respect to land comprised in khasra Nos. 786, 787, measuring 0-1-14 bighas situate in Mohal Chhatru-218, Tehsil Sadar, District Mandi and also prayed for a decree of possession regarding

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Whether the reporters of the local papers may be allowed to see the Judgment?

land comprised in khasra No. 785, measuring 0-2-0 bighas, situate in village Chhatru. The suit of the plaintiff is based upon title, according to appellant, he is in possession of land comprised in khasra Nos. 786 and 787, but he was dispossessed from land comprised in khasra No. 785 on 12.10.1989. The suit was contested by the respondents by filing common written statement. They have taken preliminary objections of maintainability and limitation. On merits, they have taken the plea of adverse possession since the time of their predecessor Udhami. The trial court decreed the suit and granted a decree of permanent prohibitory injunction as well as of possession with respect to the suit land, as prayed by the appellant. The respondents filed an appeal. The learned District Judge allowed the appeal partly and the decree of permanent prohibitory injunction regarding the land comprised in khasra Nos. 786 and 787 was maintained, but the suit of the appellant/ plaintiff with respect to khasra No. 785 was dismissed, hence, this appeal by the appellant-plaintiff to the extent the learned District Judge has dismissed the suit.

3. The appeal has been admitted on the following substantial questions of law:-

(i) Whether the possession on account of alleged tenancy of tenant can mature into title on the basis of plea of adverse possession?

(ii) Whether the plea of adverse possession stands legally proved without any evidence of ouster?

(iii) Whether the plea of tenancy on the basis of entry of non-occupancy tenancy in the revenue record can be sustained without any payment of rent and without any proof of a contract to the contrary?

(iv) Whether the judgement and decree in appeal modifying the judgement and decree of the trial court with respect to khasra No. 785 can be sustained in the given facts and circumstances of the case?

4. I have heard the learned counsel for the parties and have gone through the record. The learned counsel for the appellant has submitted that lower appellate court has erred in returning the finding that respondents have acquired title of land comprised in khasra No. 785 on the basis of adverse possession. He has submitted that no finding has been returned by the lower appellate court as to when the hostile title by the respondents started and when it matured into ownership. He has submitted that the finding of adverse possession recorded by the learned District Judge is against the admission of respondent No.1 made by him while appearing as a witness, which demolishes the case of respondents of adverse possession on khasra No. 785. The learned counsel for the respondents has supported the impugned judgement and decree.

Substantial questions of law No. (i) to (iv).

5. The substantial questions of law No. (i) to (iv) are interconnected and, therefore, are being disposed of collectively. The trial court had decreed the suit of the appellant in its entirety. The lower appellate court has upheld the decree of permanent prohibitory injunction passed by the learned trial court in favour of the appellant regarding land comprised in khasra Nos. 786 and 787. This part of the decree has attained finality, as respondents have not filed any appeal or cross-objections against the impugned judgement and decree. The question before this court is only with respect to the

dispute of adverse possession regarding the land comprised in khasra No. 785. The necessary pleadings with respect to khasra No. 785 are in paragraph No.2 of the plaint where the appellant has pleaded that he is owner of land comprised in khasra No. 785, measuring 0-2-0 bigha. He has pleaded that on this land there was a cowshed of the appellant which was destroyed in the floods.

6. The respondents in paragraph No.2 of the written statement have denied the existence of cowshed of appellant on khasra No. 785. They have submitted that father of respondent No.1 in the year 1961 had constructed a cowshed on this piece of land, which was destroyed about 18 years ago and thereafter respondent No.1 is in cultivating possession of this piece of land and possession of respondent No.1 over this piece of land is open, hostile, uninterrupted, continuous, peaceful and notorious to the knowledge of appellant since 1961. The respondents have not taken any other plea in support of their title on land comprised in khasra No. 785. The moment respondents take the plea of adverse possession against the appellant regarding the land comprised in khasra No. 785, they impliedly admit the ownership of appellant on land comprised in khasra No. 785 at-least at one point of time.

7. The adverse possession is to be pleaded and proved by the party taking the plea of adverse possession. The lower appellate court has discussed the possession of the respondents on land comprised in khasra No. 785 and has returned the finding that Udhami was not tenant on this piece of land. The lower appellate court has observed that cowshed was constructed on this piece of

land by Udhami, which was used by Udhami and respondent No. 1 till 1970 and thereafter Gawainu respondent cultivated this piece of land and that indicates that possession of respondent was open, hostile and to the knowledge of the appellant. The lower appellate court has not recorded a specific finding that when respondents started hostile claim over khasra No. 785 by way of adverse possession against the appellant and when such hostile claim ripened into title by way of adverse possession in favour of the respondents.

8. It is settled law that possession howsoever long will not confer title by way of adverse possession unless party claiming adverse possession has actually pleaded and proved the starting point of adverse possession and also when such claim ripened into title by way of adverse possession. The lower appellate court has not considered the admission made by DW 2 Gawainu Ram respondent No. 1. In his cross-examination, he has stated that entry of non-occupancy tenant in favour of his father in the revenue record regarding the suit land is correct and since his father was non-occupancy tenant on the suit land, therefore, under new law he became owner of the suit land. This statement of respondent No.1 completely demolishes his case of adverse possession on any part of the suit land including khasra No. 785. The respondents in their written statement have not taken the plea of tenancy on any part of the suit land. The respondent No.1 in his statement as DW 2 has put forward the claim of tenancy on the suit land. The lower appellate court by ignoring this important piece of evidence has erred in returning the finding that respondents have become owners by way of

adverse possession on land comprised in khasra No. 785. The finding recorded by the lower appellate court regarding the adverse possession of respondents on khasra No. 785 is not sustainable and is accordingly set-aside. The substantial questions of law No. (i) to (iv) are decided in favour of the appellant and against the respondents.

9. The learned counsel for the respondents has submitted that appellant- plaintiff himself has not appeared in the witness box and therefore, in view of **Tokha** vs. **Smt. Biru and others** [2002 (3) SLC 101], an adverse inference is to be drawn against the appellant. The plea of adverse possession was taken by the respondents, it was for them to prove such plea which they have failed completely. The title of the appellant on the suit land including khasra No. 785 has been established by the stand of the respondents themselves. Therefore, there is no question of taking any adverse inference against the appellant. In **Tokha's** case (supra), one of the questions involved was whether the donee or after his death the defendants have failed to provide maintenance to the plaintiff and thus the deed of gift and consequential mutation of the estate of deceased in favour of deceased are liable to be set-aside. It was for the plaintiff to state and rebut that the deed of gift executed by her in favour of the donee was conditional and after the death of donee the defendants have failed to maintain her. These facts were within the special knowledge of the plaintiff in that case. Her attorney, who appeared as a witness simply pleaded ignorance to those facts, this court in those circumstances has drawn adverse inference for non appearance of

the plaintiff as a witness in the case. In the present case, the facts are entirely different. The title of the appellant on the suit land is not in dispute in view of the stand of the respondents of adverse possession and it was for the respondents to prove their adverse possession on the suit land, which they have failed to prove. Hence, **Tokha's** case supra is not applicable in the facts and circumstances of the present case.

10. The learned counsel for the respondents has submitted that lower appellate court has recorded a finding of fact regarding adverse possession and therefore, in second appeal such finding is not to be interfered with. In the present case, the finding recorded by the lower appellate court is perverse and contrary to material on record. The lower appellate court has not recorded a specific finding when alleged adverse possession of respondents on khasra No. 785 started and when it culminated into full ownership, nor the lower appellate court has considered vital statement made by respondent No.1, who appeared as DW 2 and stated that his father was tenant on the suit land and he became owner under the new law, meaning thereby H.P. Tenancy and Land Reforms Act. The respondents by this stand gave a new twist to their defence, which was not even pleaded. This aspect was not at all considered by the lower appellate court. The lower appellate court has drawn inference regarding adverse possession of respondents on khasra No. 785 from the material on record, which is not at all possible.

11. No other point was urged.

12. The result of the above discussion, the appeal is allowed. The impugned judgement and decree regarding land comprised in khasra Nos. 786 and 787 are upheld but regarding land comprised in khasra No. 785 are set-aside. The suit of the appellant-plaintiff is decreed in its entirety by restoring the judgement and decree passed by the trial court. No orders as to costs.

October 24 ,2007. **(Kuldip Singh)**
(*Hem*) **Judge.**